Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-265

UNITED STATES OF AMERICA,
*Petitioner,*

v.

FRANK W. SNEPP, III,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## BRIEF OF FRANK W. SNEPP, III IN OPPOSITION

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Frank W. Snepp, III respectfully opposes the conditional petition for a writ of certiorari filed by the United States.

## QUESTION PRESENTED

May a constructive trust be imposed on the earnings of a former government employee who, without his employer's permission, publishes unclassified information acquired through his employment?

## STATEMENT OF THE CASE

Respondent incorporates the statement on pages 2-7 of his petition in No. 78-1871. However, there is one assertion made in the government's statement of the case – which it has incorporated by reference from its opposition in No. 78-1871 – which is very much in dispute. On page 3, the government alleges that on a number of occasions Mr. Snepp assured CIA officials (including the Director of Central Intelligence) that he would submit his manuscript for pre-publication review. This is not a fact, but an allegation which Mr. Snepp has vigorously disputed and which is one of the issues which the court of appeals has ruled must be decided by a jury. (Pet. App. at 39a).

## REASONS FOR DENYING THE WRIT

The court of appeals was correct in ruling that a constructive trust cannot be imposed on a former government employee who publishes employment-related, but unclassified, information without his employer's permission. Furthermore, as the court of appeals concluded, there are no cases to the contrary. (Pet. App. at 35a n.9). The government asserts that because respondent signed a secrecy agreement which called for pre-publication review of his writings, a fiduciary duty to perform this alleged contractual agreement was thereby imposed on him. Although an employment contract may create a fiduciary relationship, *Restatement of Agency, 2d*, §376 (1958), not all breaches of such contracts warrant the extreme remedy of a constructive trust. *Id.*, §400 comment c; §403 comment e. Since the duty to seek permission to publish employment-related information has never been recognized as a fiduciary duty, a violation of that duty does not rise to the level of a breach of fiduciary duty.

Since there is no conflict on this issue among the circuits or among any other courts, the petition should be denied.

Moreover, the government concedes that its interests in this case are sufficiently served by the contractual remedies approved by the court of appeals. (Petition at 5). However, it asserts that punitive damages are an uncertain remedy and an insufficient deterrent for other CIA employees who might publish without submitting to agency censorship. This amounts to no more than a request that this Court fashion a new rule of law, contrary to all existing authority, solely for application in future cases.

## CONCLUSION

The conditional cross-petition should be denied.

Respectfully submitted,

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